11-28-2011

State v. Ligon-Bruno Appellant's Brief Dckt. 38691

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38691
	)	
v.	)	
	)	
DANIEL A. LIGON-BRUNO,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature of the Case

Daniel A. Ligon-Bruno appeals from a judgment of conviction for destruction, alteration, or concealment of evidence based on his conditional guilty plea entered after the denial of his motion to suppress. On appeal, Mr. Ligon-Bruno asserts that the district court erred when it denied his motion to suppress evidence found during three warrantless searches of his home because the State failed to satisfy its "heavy burden" of proving an exception to the warrant requirement.

Statement of the Facts and Course of Proceedings

This case began when law enforcement officers responded to a "burglary in progress" call at Mr. Ligon-Bruno's apartment. (Tr.Vol.I,[1] p.9, Ls.11-21; p.30, Ls.5-12.) A witness had called 911 to report seeing a man crawl through an outside window, open the front door, unscrew the front light bulb, reenter the apartment through the door, and leave through the window. (Tr.Vol.I, p.10, Ls.4-12.) Deputy Franssen of the Kootenai County Sheriff's Department was the last of four law enforcement officers who initially responded to the call.[2] (Tr.Vol.I, p.11, Ls.10-13, p.87, Ls.23-25.) By the time Deputy Franssen arrived, another deputy had stopped the suspect,[3] who claimed to be a

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[1] Two transcripts were prepared for appeal. One contains transcripts from hearings on the motion to suppress conducted on June 18 and June 23, 2010, as well as the guilty plea and sentencing hearings, held on February 7, 2011, and March 23, 2011, respectively. For ease of reference, appellate counsel has labeled that transcript as volume I. The other transcript is from another hearing on the motion to suppress held on October 1, 2010, which appellate counsel has labeled as volume II.

[2] The other three officers were Deputy Bixby, Deputy Moffett, and Deputy Ellis. (Tr.Vol.I, p.87, Ls.23-25.) Another officer, Detective Brandel, arrived later. (Tr.Vol.I, p.

[3] The suspect was later identified as "Mr. Steger." (Tr.Vol.I, p.41, Ls.5-11.)

resident of the apartment, in front of the apartment complex.[4] (Tr.Vol.I, p.13, L.23 – p.14, L.23.)

Deputy Franssen, accompanied by Deputy Bixby, then approached the second-floor apartment to investigate. They noticed that the window, which was obscured by mini-blinds, was open approximately one to two inches, with a small security camera "in between two of the miniblinds." (Tr.Vol.I, p.14, L.24 – p.17, L.1.) They then conducted a "knock and announce," in which Deputy Franssen knocked on the front door and announced, in a "[l]oud" voice, that he was with the sheriff's department, and, having received no response, Deputy Bixby knocked on the window, and "yelled in through the open portion of the window" in a "[l]oud" voice. Deputy Bixby testified that they "pound[ed] the door" and "yell[ed]: 'Sheriff's Department. Open up.'" (Tr.Vol.I, p.95, Ls.24-25.) After receiving no response, Deputy Franssen went downstairs to speak with Mr. Steger to find out if there was anyone else in the apartment. Mr. Steger gave conflicting answers, first denying that anyone else was in the apartment, then admitting that his roommates might be inside, before again denying that anyone else was inside. Deputy Bixby remained upstairs and "maintained a visual on the apartment[.]" (Tr.Vol.I, p.14, L.24 – p.20, L.6.)

The Initial Contact With Mr. Ligon-Bruno

Next, Deputy Bixby, accompanied by Deputy Ellis, "slid the window open[] [and] pushed the blinds out of the way so we could get a clear view into the apartment." Deputy Bixby later acknowledged that his hands had entered the apartment in order to move the blinds. (Tr.Vol.I, p.120, Ls.8-10.) He then announced that the sheriff's

[4] Mr. Steger matched the description, both with respect to physical characteristics and clothing, of the person described by the 911 caller. (Tr.Vol.I, p.41, Ls.8-11.)

department was there, asked if anyone was inside, and ordered anyone inside to come out. At that point, Mr. Ligon-Bruno appeared, "peeked his head out around the corner [and] [a]sked what are we doing there?" Deputy Bixby told him to "'[s]tep this direction[,]'" and, when he started for the door, ordered him to exit through the window. (Tr.Vol.I, p.96, L.8 – p.99, L.5.)

Deputy Franssen testified that, while interviewing Mr. Steger downstairs, he heard Deputy Bixby "yelling: 'Let me see your hands.'" Deputy Franssen's reaction was to run upstairs, at which point he observed Deputy Bixby and another deputy "having a male step out of the window that was now open onto the balcony where he was detained." In further questioning, Deputy Franssen described, in greater detail, the process by which Mr. Ligon-Bruno exited the apartment. He explained, "He was being assisted out of the window. He wasn't being pulled to the extent that he was completely off balance ... I believe deputies maintained control of his hands ... while maintaining control of his ability to cause harm to officers, he was brought out of the window." (Tr.Vol.I, p.22, Ls.9-23.) That man was verbally-identified as Mr. Ligon-Bruno, placed in handcuffs, and asked whether anyone else was in the apartment. Mr. Ligon-Bruno then "stated that Luca was still inside the apartment." Mr. Ligon-Bruno also indicated that he had been asleep inside before he went to the window. Deputy Franssen then called for Luca to exit the apartment. Luca exited the apartment, and was detained in handcuffs. (Tr.Vol.I, p.19, L.7 – p.25, L.6.)

The apartment complex to which the police had responded was one of two "[r]elatively small" complexes that are next to each other. Each complex has fewer than fifteen apartments, and both are located on a single block "on the north side of Wyoming Avenue[.]" (Tr.Vol.I, p.77, Ls.4-9.) Prior to anyone entering Mr. Ligon-Bruno's

apartment (Tr.Vol.I, p.82, Ls.10-20), police attempted to verify Mr. Steger's claim that he lived in the apartment by calling his mother. According to Deputy Franssen,

> Central dispatch contacted her by telephone. And she was able to provide that she knew that he lived in an apartment across from Ziggy's, which is on the south side of Wyoming but no particular number or couldn't even identify to the best of my knowledge which apartment complex it was.

(Tr.Vol.I, p.80, Ls.3-19.)

Initial Entry Into The Apartment

Deputy Bixby testified that, after Luca, Mr. Ligon-Bruno, and Mr. Steger were handcuffed, he entered the apartment through the window. After Deputy Bixby's entry through the window, it was discovered that the reason that the front door was not being used as the main entrance was because it had been taped shut after a recent break-in. (Tr.Vol.I, p.66, Ls.8-16.)

Leaving the other deputies outside, Deputy Bixby testified,

> [I] [w]alked straight into the apartment towards the hallway, cleared the kitchen, which was the first room adjacent to the living room. Looking down the hallway the bedroom was the next door on the left. There was, I believe, a closet somewhere in the hallway.

(Tr.Vol.I, p.101, Ls.12-19.) Deputy Bixby said that he did this "to make sure nobody else was inside the house" and described it as "a quick sweep[.]" (Tr.Vol.I, p.101, L.23 – p.102, L.7.)

During this sweep, Deputy Bixby noticed several items, including "burnt marijuana cigarettes, rolling papers" and "a soda can or energy drink can ... that was punctured ... [and] had burnt residue on it made for smoking." He also noticed "numerous weapons ... in the living room and throughout the house[,]" including

baseball bats, knives, and a hatchet.[5] He described both bedrooms as "just a mess." (Tr.Vol.I, p.103, L.22 – p.104, L.18.) On cross-examination, the following exchange occurred:

> [Defense counsel:] *When you made that sweep, sir, that first sweep as counsel puts it, what indications did you find that would lead you to believe that someone else was armed or dangerous or anything like that inside the residence?*
>
> [Deputy Bixby:] *Once I was inside?*
>
> [Defense counsel:] Yes, sir.
>
> [Deputy Bixby:] *Nothing.* That's what a safety sweep is. You go in, check the residence, come back out.

(Tr.Vol.I, p.121, L.20 – p.122, L.2 (emphases added).)

Second Entry Into the Apartment

Deputy Bixby then went to the front door,[6] opened it, and he and the other deputies brought the still-handcuffed Luca and Mr. Ligon-Bruno into the apartment, and "had them sit down in the chairs in the living room." (Tr.Vol.I, p.102, Ls.8-19, p.106, L.23 – p.107, L.3.)

During a second sweep of the apartment, deputies heard the toilet running, and removed the lid from the toilet tank, discovering "something that did not belong inside the toilet tank. And at that point we just left it inside the toilet tank." (Tr.Vol.I, p.104, L.19 – p.106, L.19.) Deputy Bixby deduced that the items in the toilet tank were the cause of the continuous running of the toilet because they appeared to be interfering

---

[5] The State, either in argument or through its witnesses, never contended that there was anything unlawful about the "weapons" observed inside the apartment.

[6] After Deputy Bixby's entry, it was discovered that the reason that the front door was not being used as the main entrance was because it had been taped shut after a recent break-in. (Tr.Vol.I, p.66, Ls.8-16.)

with the mechanism that stops the water from flowing. He did not remove the items or do anything else to stop the water from continuing to run. (Tr.Vol.I, p.110, Ls.1-18.)

Deputy Franssen then learned that Mr. Ligon-Bruno was on felony probation, contacted the probation department, and received permission from a probation officer to search the home. It was only after receiving this permission that Deputy Franssen removed the items from the toilet tank, discovering two digital scales, "200 small, plastic Ziplock-type bags, hyperdermic [sic] needles, spoons, scrapers, straws." Deputy Franssen also searched the drawers in the bathroom after speaking with the probation department, discovering additional hypodermic needles, "playing cards that had been cut and modified, dirty spoons with residue on them that appeared to be consistent with the use of methamphetamine. A shaving bag that was located on the counter in the bathroom that contained a ledger." (Tr.Vol.I, p.35, L.1 – p.40, L.15.)

At the hearing on his motion to suppress, at the request of both parties, the district court took judicial notice of three documents from Kootenai County Criminal Case No. 05-17960, the case for which Mr. Ligon-Bruno was on unsupervised probation at the time of the instant offense. The first was the withheld judgment and sentencing disposition, containing, *inter alia*, terms and conditions of probation, including paragraph 19, which states, "You shall submit to searches of your person, personal property, automobiles, and residence without a search warrant at the request of your probation officer." The second was the Petition for Unsupervised Probation and Case in Summary. The third was the district court's order converting Mr. Ligon-Bruno's probation to unsupervised probation, signed on May 22, 2008,[7] which ordered that he

[7] The searches of Mr. Ligon-Bruno's home that led to the charges in this case occurred on January 4, 2010. (R., p.10.)

be "discharged from further supervised probation to unsupervised probation under all previously ordered terms and conditions until February 21st[, 2010]." (Tr.Vol.I, p.145, L.2 – p.147, L.11.)

Following a preliminary hearing, Mr. Ligon-Bruno was charged with possession of a controlled substance with the intent to deliver. (R., pp.37, 48-49.) Defense counsel then filed a motion to suppress the evidence, requesting that all evidence gathered against Mr. Ligon-Bruno, including any statements, be suppressed because the warrantless search of his home violated both the United States Constitution and the Idaho Constitution. Mr. Ligon-Bruno also sought suppression of any statements made by the defendant, and any derivative evidence, because the statements were obtained while he was unlawfully detained in violation of both the United States Constitution and the Idaho Constitution. Finally, he sought suppression of any evidence obtained from a warrantless search of his cell phone. (R., pp.58-59.) Defense counsel filed a memorandum in support of the motion to suppress (R., p.62), the State filed a response (R., p.72), and the parties filed further memoranda on additional issues that arose after the evidentiary hearings and the earlier memoranda. (R., pp.95, 102, 107.)

Defense counsel advanced several arguments in support of suppression, two of which are relevant on appeal. First, he argued that the warrantless entry into Mr. Ligon-Bruno's apartment violated his rights under the Fourth Amendment to the United States Constitution and Article I, section 17, of the Idaho Constitution, and required suppression of all resulting evidence, including statements made by Mr. Ligon-Bruno. (R., pp.63-64.) In a supplemental memorandum, defense counsel argued, *inter alia*, that "[b]ut for the initial warrantless entry, there is no indication that a probation search of this unsupervised probationer would have occurred[.]" (R., pp.102-06.)

Following argument on the motion, the district court issued an order granting the motion to suppress with respect to the contents of Mr. Ligon-Bruno's cell phone, while denying it in all other respects. (R., p.157.) The district court announced its findings of fact and conclusions of law in open court. (Tr.Vol.II, p.11, L.21 – p.27, L.16.) The district court's holdings were that Deputy Bixby's initial sweep of the apartment was justified based on exigent circumstances. Specifically, the district court found,

> At this point the police did not know whether the man who was leaving the apartment belonged there. The police did not know whether there was a burglary going on in process. They did not know whether there were further perpetrators of a possible burglary within that apartment. They did not know whether there were potential victims of serious crime within that apartment who needed immediate and serious care of law enforcement. They had exigent circumstances to enter that apartment and find out if their presence was needed for very serious reasons for the safety of citizens' ongoing safety.

(Tr.Vol.II, p.14, Ls.6-21.)

With respect to the second entry, the district court concluded,

> The Court finds that to be not necessarily a reentry of the house. The police are already in the house. They are already conducting a safety sweep of that house. And just the fact that they bring the suspects into the house and then continue that safety sweep in a bit more detail does not mean that there was a reentry or that the safety sweep had lost its legitimacy and importance. The further, more detailed safety sweep was legitimate under the circumstances, and the Court finds it to be constitutionally supportable.

(Tr.Vol.II, p.16, L.21 – p.17, L.5.)

As for the lifting of the toilet's lid during the second entry, the district court concluded,

> The Court finds that it was reasonable for the police to lift the lid of that toilet to find out what was going on under exigent circumstances, given the circumstances of seeing the paraphernalia and the smell of burning marijuana and a continuously running toilet. There was the distinct likelihood that items of evidence were either being destroyed or in the water that was running continuously in the tank of that toilet.

(Tr.Vol.II, p.18, L.24 – p.19, L.7.)

Finally, with respect to the probation justification, the district court concluded,

> The Court specifically finds that under these particular circumstances, based upon the exigent circumstances, entry into this residence based upon what was seen in plain view as a result of those exigent circumstances, that the police were not simply requesting permission of the probation officer as a means of circumventing the warrant requirement.
>
> ...
>
> This Court does not find that the request had to be made by a specific probation officer specifically to Mr. Ligon-Bruno.
>
> ...
>
> The Court finds that, under all of these circumstances, this was a reasonable search of the apartment and is constitutionally supportable under the probation search exception to the warrant requirement.

(Tr.Vol.II, p.26, Ls.14-25.)

Following the partial denial of his motion to suppress, Mr. Ligon-Bruno and the State entered into a Rule 11 plea agreement, the terms of which the district court summarized as follows:

> The Court has reviewed the plea agreement ... [it] calls for the State to file an Amended Information that accuses Mr. Ligon-Bruno with the felony offense of destruction of evidence.
>
> ...
>
> The plea agreement then calls from Mr. Ligon-Bruno to plead guilty pursuant to *Alford v. North Carolina*[8] to that amended charge of destruction of evidence. This will also be a conditional guilty plea wherein Mr. Ligon-Bruno reserves the right to appeal the Court's denial of the Defendant's Motion to Suppress Evidence. And then this is offered to the Court under a binding Rule 11(f) basis where the parties agree and ask the Court to be bound by that agreement of a suspended prison sentence, no more county jail than what has already been served as a condition of probation, and three years of supervised probation. The Court would set the underlying sentence at its discretion.

[8] *See Alford v. North Carolina*, 400 U.S. 25 (1970).

(Tr.Vol.I, p.157, L.14 – p.158, L.11.) Mr. Ligon-Bruno pleaded guilty pursuant to this agreement. (Tr.Vol.I, p.167, Ls.7-12.)

At sentencing, the district court followed the agreement, imposed and suspended a unified sentence of four years, with two years fixed, and placed Mr. Ligon-Bruno on three years of supervised probation. (Tr.Vol.I, p.187, Ls.1-4.) Mr. Ligon-Bruno then filed a Notice of Appeal timely from the judgment of conviction. (Notice of Appeal.[9])

[9] A file-stamped copy of the Notice of Appeal is attached to a Motion to Augment filed on November 23, 2011.

ISSUE

Did the district court err when it denied Mr. Ligon-Bruno's motion to suppress evidence discovered during three warrantless searches of his home because the State failed to meet its "heavy burden" of proving an exception to the warrant requirement?

ARGUMENT

The District Court Erred When It Denied Mr. Ligon-Bruno's Motion To Suppress Evidence Discovered During Three Warrantless Searches Of His Home Because The State Failed To Meet Its "Heavy Burden" Of Proving An Exception To The Warrant Requirement

A. Introduction

Mr. Ligon-Bruno asserts that the district court erred when it denied his motion to suppress evidence discovered during three[10] warrantless searches of his home. First, the district court erred when it concluded that the exigent circumstances exception to the warrant requirement justified the initial entry into his home because the State failed to meet its "heavy burden" of proof for that exception. Second, assuming that the initial entry was justified, the district court erred when it concluded that the second warrantless entry was not a reentry of the home, and in holding that it was justified as a continuing protective sweep. Finally, the district court erred when it concluded that the third search, conducted at the request of a probation officer, was lawful.

B. The District Court Erred When It Denied Mr. Ligon-Bruno's Motion To Suppress Evidence Discovered During Three Warrantless Searches Of His Home Because The State Failed To Meet Its "Heavy Burden" Of Proving An Exception To The Warrant Requirement

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

---

[10] Mr. Ligon-Bruno has classified the various police intrusions into three searches because each resulted in the discovery and seizure of different pieces of evidence. The first occurred when Deputy Bixby entered to conduct his "safety sweep." The second occurred when the other deputies entered the apartment with the handcuffed Mr. Ligon-Bruno and Luca. The third occurred after a probation officer authorized a thorough search of the apartment.

U.S. CONST. amend. IV. Article I, § 17 of the Idaho Constitution contains a nearly-identical provision.

"Warrantless searches are presumptively unreasonable. The burden of proof rests with the State to demonstrate that the search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances." *State v. Weaver*, 127 Idaho 288, 290 (1995). "[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984).

In his motion to suppress, Mr. Ligon-Bruno argued that the State had unconstitutionally searched his home without a warrant. (R., pp.63-64.) At the outset of the hearing on the motion to suppress, the State acknowledged that, due to the warrantless nature of the search, it bore the burden of establishing an exception to the warrant requirement. (Tr.Vol.I, p.8, Ls.7-10.) *See Weaver*, 127 Idaho at 290.

The State advanced two arguments[11] in justifying the warrantless searches of Mr. Ligon-Bruno's home. First, the State argued that Mr. Ligon-Bruno's "probationary status effectively reduced [his] 4th Amendment rights and subjected his home and person to search." (R., p.72.) Second, at argument on the motion to suppress, the State argued that the police had "reasonable cause" to believe that a burglary was being committed, and that they were engaged in conducting "a protective sweep, trying

[11] In its initial response to Mr. Ligon-Bruno's motion to suppress, the State advanced an additional argument, asserting that Mr. Ligon-Bruno consented to the search of his home. (R., pp.81-85.) This claim was unsupported, and indeed contradicted, by evidence adduced at the suppression hearing. (Tr.Vol.I, p.25, Ls.19-24 (Deputy Franssen explaining that Deputy Bixby entered the apartment through the window as soon as Mr. Ligon-Bruno and Luca had been removed); p.100, Ls.11-21 (Deputy Bixby explaining that he entered the apartment through the window after having "secured" Mr. Ligon-Bruno and Luca).) The district court did not rule on the State's consent argument.

to see if there are any victims, if there is anybody else in there" when they discovered, "in plain view ... many, many items of paraphernalia and many, many weapons."[12] (Tr.Vol.II, p.9, L.21 – p.10, L.18.) The State closed by reemphasizing its probation argument, arguing, "If the Court finds that they had no justifiable reason to be there in that apartment, then we look at the probation conditions." (Tr.Vol.II, p.10, Ls.19-23.)

For the reasons set forth below, the State failed to meet its "heavy burden" of proof as to the exigent circumstances exception, and the probation exception argument is unpersuasive because the probation search was not valid.

1. The State Failed To Meet Its "Heavy Burden" Of Proof That The Initial Entry Was Justified By The Exigent Circumstances Exception

Mr. Ligon-Bruno asserts that the district court's holding that the initial warrantless entry into his home was justified under exigent circumstances, specifically the belief in the possibility that a burglary had been committed and that either victims or perpetrators were still inside, was erroneous because the State failed to meet its "heavy burden" of proof on the issue.

In *State v. Bunting*, 142 Idaho 908 (Ct. App. 2006), the Idaho Court of Appeals ably and eloquently summarized the law concerning the exigent circumstances exception to the warrant requirement of the State and federal constitutions as follows:

> Under the exigent circumstances exception, agents of the state may engage in warrantless searches when there is compelling need for official action and no time to secure a warrant. However, a warrantless search under this exception must be strictly circumscribed by the nature of the exigency that justifies the intrusion. The test for application of this warrant exception is whether the facts as known to the agent at the time of entry, together with reasonable inferences, would warrant a reasonable belief

[12] Although it appears that the State was attempting to make an exigent circumstances argument, it never used the term, nor did it cite to any case law in support of its argument. (Tr.Vol.II, p.9, L.20 – p.11, L.16.)

> that an exigency justified the intrusion. The burden is on the state to show the applicability of this exception to the warrant requirement.

Id. at 912 (internal citations omitted).

Idaho appellate courts have considered the applicability of the exigent circumstances exception to suspected burglaries several times. *State v. Araiza*, 147 Idaho 371 (Ct. App. 2009) involved a remarkably similar initial suspicion of a residential burglary. In that case, an officer was on patrol at approximately 11 p.m. when he saw a man standing near the window of a house. "It appeared to the officer that the man had either just left the house through the window or was attempting to enter through the window." *Id.* at 373.

The officer stopped to investigate, but by the time he had parked, the man was no longer visible. He knocked on the door, and an elderly woman, identified as Mary Mosqueda, who lived there answered. She told the officer that the name of the man he had seen was Roy, explained that he was inside, and said "that everything was fine." At the officer's request, Ms. Mosqueda had Roy approach the front door, at which point the officer obtained his full name (Roland Araiza), date of birth, and social security number. While the first officer checked Araiza's information in his patrol car, another officer "stood with Araiza at the door." Araiza, wearing only jeans, asked that officer if he could reenter the residence to get some additional clothing. After receiving permission, Araiza reentered the residence and closed the front door. *Id.*

After failing to verify Araiza's identity, the first officer rejoined the second officer at the front door. They knocked, no one answered, and they discovered that the front door had been locked. A neighbor, identifying herself as Ms. Mosqueda's daughter, then arrived, "claimed not to know anyone by Araiza's name and told the officers that

there should be no one in the house aside from her mother and the daughter's two young sons." Next,

> [t]he officers and Mosqueda's daughter continued knocking on the door and windows of the residence and the daughter tried to call her mother on her cell phone, but no one responded and the officers heard no noise coming from the house. A young man, later identified as Mosqueda's grandson, drove up to the scene, and also told the officer that he did not recognize Araiza's name and that no other adult should be in his grandmother's house.
>
> After several minutes of trying to contact the house's occupants, the officers could see through the windows that Mosqueda and Araiza were in the southwest corner of the house. Concerned for the safety of Mosqueda and her grandsons, the officers forcibly entered the home by breaking down a door. They found Araiza in the back bedroom with Mosqueda, where they arrested him for obstructing a police investigation. Mosqueda then informed them that she had not responded to their shouts and knocking because Araiza had not allowed anyone to answer the door. When asked whether Araiza had any additional clothing to take with him, Mosqueda led the officers to another bedroom and pointed to a jacket and unzipped duffel bag on the floor. Inside the bag, a glass pipe containing burn residue was clearly visible and a subsequent search of the bag revealed additional drug paraphernalia and methamphetamine.

Id.

After being charged with possession of a controlled substance and possession of drug paraphernalia, Araiza filed a motion to suppress, challenging the warrantless entry into the home. The district court denied the motion and Araiza appealed *Id.*

In affirming the district court's denial of the motion to suppress, the Court outlined the facts supporting a finding of exigent circumstances as follows:

> [W]hile his identity remained unclear, Araiza closed and locked the front door and none of the residents would open the door, answer the phone, or respond to knocking on the windows and beckoning from the officers. The officers were provided further reason to be concerned when a woman who identified herself as Mosqueda's daughter denied recognizing Araiza's name and informed them there should be no one else in the residence aside from Mosqueda and the daughter's two young children. Additionally, Mosqueda's grandson arrived on the scene and also denied recognizing Araiza's name and agreed with Mosqueda's daughter that no

> one else should be in the home aside from his grandmother and two young cousins.

Id. at 375-76.

According to the Court, these facts gave officers "a reasonable concern that Araiza was an intruder and holding Mosqueda against her will." As for Araiza's argument that Mosqueda's "calm demeanor ... and assurances that everything was fine[,]" the Court concluded that "[g]iven the ignorance of Araiza's identity claimed by family members on the scene, it was not unreasonable for the officers to doubt Mosqueda's assurances." *Id.* at 376.

In another case in which it considered the warrantless police entry into a home following the report of a possible intruder, the Idaho Court of Appeals, in *State v. Rusho*, 110 Idaho 556 (Ct. App. 1986), held that

> even though the possibility of an intruder had not been wholly eliminated, we do not believe that such a bare possibility is sufficient to justify a warrantless, nonconsensual search. This is a question of constitutional dimension, weighing the state's interest in public safety against a citizen's right to maintain the privacy of her home. Fourth amendment values would be gravely impaired if the mere report of an intruder became a license for the police to enter a home and to search it without a warrant, over the homeowner's objection. A balance must be struck. *We hold that such warrantless and nonconsensual searches are permissible only if there is probable cause to believe that an intruder exists and it reasonably appears that persons or property are in immediate danger.* The initial report of an intruder, uncorroborated by other facts, is insufficient to overcome a homeowner's right to say "forget it."

Id. at 560 (emphasis added).

Unlike the facts in *Araiza*, once Mr. Ligon-Bruno and Luca had been removed from the apartment, there was no reason for the police to believe that anyone else was still inside. Additionally, prior to entering the apartment, the police had already verified, via Mr. Steger's mother, that he lived in one of the less than thirty apartments on that block. (Tr.Vol.I, p.80, Ls.3-19.) Finally, officers made no attempt to verify Mr. Ligon-

Bruno's claim that he lived in the apartment until after they had conducted two searches. (Tr.Vol.I, p.35, Ls.16-23.) A simple call to the probation department, as eventually happened, would have resulted in the discovery that Mr. Ligon-Bruno had lived at the apartment for at least twenty months. (Tr.Vol.I, p.131, L.25 - p.132, L.10 (Mr. Ligon-Bruno's former probation officer testifying that he last visited his apartment on April 16, 2008, and that it was his belief that it was still Mr. Ligon-Bruno's residence).) The State failed to establish facts to support a finding that exigent circumstances justified the initial entry into his apartment, which resulted in the discovery of drug paraphernalia, as well as the second and third searches, which disclosed the evidence which led to his conviction.

As the Court of Appeals cautioned in *Rusho*, in exigent circumstances cases, "a balance must be struck" between legitimate public safety concerns and the right to be secure in one's home. Where, as here, the police possessed, at most, a belief that it was "entirely *possible* that a burglary, a theft, or other crime had been committed inside of the residence[,]"[13] such a belief was insufficient to support a finding that probable cause existed *and* that it was reasonable to believe that persons or property were in immediate danger, as is required under *Rusho.*

[13] Deputy Franssen testifying that, prior to Mr. Ligon-Bruno and Luca exiting the apartment, he "believe[d] that it was entirely possible that a burglary, a theft, or other crime had been committed inside of the residence." (Tr.Vol.I, p.44, Ls.13-18.) When later asked what crime he believed had been committed at the time that he entered Mr. Ligon-Bruno's apartment, Deputy Franssen testified, "Potentially a burglary." (Tr.Vol.I, p.59, Ls.15-17.) As will be discussed next, there is no crime scene exception to the Fourth Amendment's warrant requirement. *See Mincey v. Arizona*, 437 U.S. 385 (1978).

2. Assuming, *Arguendo*, That The Initial Entry Was Justified Based On Exigent Circumstances, The District Court Erred In Finding That The Second Entry Was Not A Reentry And That It Was Justified As A Continuing Protective Sweep

Assuming, *arguendo*, that the initial entry by Deputy Bixby was justified under the exigent circumstances exception to the warrant requirement, the district court nevertheless erred when it found that the second entry was not a "reentry" and that it was justified as a continuation of the protective sweep.

Absent exigent circumstances, there is no crime scene exception to the Fourth Amendment's warrant requirement. *Mincey v. Arizona*, 437 U.S. 385, 394-96 (1978). In *Mincey*, the Supreme Court recognized that "when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises" and that they "may seize any evidence that is in plain view during the course of their legitimate emergency activities." *Id.* at 392-93 (citing *Michigan v. Tyler*, 436 U.S. 499 (1978) and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)). Unlike those cases, however, the police investigating Mincey had already located all of the persons in his apartment by the time that they began "a four-day search that included opening drawers and ripping up carpets." *Id.*, 437 U.S. at 393. The Court noted that "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant." *Id.* at 394.

The State, responsible for establishing the applicability of an exception to the warrant requirement, did not make an argument that there was no reentry, and the district court cited no case law for its conclusion that the entry of the home by additional officers following Deputy Bixby's initial sweep was "not necessarily a reentry of the house." The import of the reentry issue is that it was only after this reentry that officers discovered the evidence that resulted in the charges against Mr. Ligon-Bruno. (R., p.10

(charging Mr. Ligon-Bruno with possession of a controlled substance, specifically methamphetamine, with intent to deliver); pp.176-77 (the amended information, charging Mr. Ligon-Bruno with destruction, alteration, or concealment of evidence by concealing drugs or drug paraphernalia in a toilet tank, the charge to which Mr. Ligon-Bruno entered a conditional plea).) A search justified by exigent circumstances is only appropriate and justified when it is "strictly circumscribed by the exigency ... and cannot be used to support a general exploratory search ... an officer may not act outside the scope of the justification for the entry." *State v. Wiedenheft*, 136 Idaho 14, 17 (Ct. App. 2001) (citing *State v. Sailas*, 129 Idaho 432, 435 (Ct. App. 1996)).

Pursuant to *Mincey*, and assuming that Deputy Bixby's initial warrantless search of Mr. Ligon-Bruno's apartment was justified in an effort to discover victims in need of aid or additional perpetrators, there was no basis for the additional warrantless search of his home that occurred when the deputies took Mr. Ligon-Bruno and the two other detainees inside the apartment. This is especially true in light of the following testimony from Deputy Bixby:

> [Defense counsel:] When you made that sweep, sir, that first sweep as counsel puts it, what indications did you find that would lead you to believe that someone else was armed or dangerous or anything like that inside the residence?
>
> [Deputy Bixby:] Once I was inside?
>
> [Defense counsel:] Yes, sir.
>
> [Deputy Bixby:] Nothing. That's what a safety sweep is. You go in, check the residence, come back out.

(Tr.Vol.I, p.121, L.20 – p.122, L.2.)

In light of the fact that any exigent circumstances were no longer present before the second search, the Court's determination that lifting the lid of the toilet during that

second search was justified by fear that evidence could be lost or destroyed was erroneous. According to the testimony elicited at the suppression hearing, it was not until the second search had begun that officers became concerned about the running of the toilet. (Tr.Vol.I, p.104, L.16 – p.106, L.19 (Deputy Bixby testifying that he only became concerned about the running toilet during the "second sweep").) As such, the first search could not have provided the basis for any additional exigency concerning the potential loss or destruction of evidence prior to the second search.

3. The Third Search, Conducted At The Request Of A Probation Officer, Was Not Lawful

Mr. Ligon-Bruno asserts that the third search, conducted under the direction of a probation officer, was not lawful because it was only authorized as a result of the discovery of contraband during the initial unlawful searches, thereby rendering any evidence discovered as a result fruit of the poisonous tree.

The law is well-settled that evidence that is discovered through the exploitation of illegal acts of the police must be suppressed as the "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). In this case, the evidence is undisputed that a probation officer only requested that the police conduct a thorough search of Mr. Ligon-Bruno's apartment because he had been told of the contraband discovered during the first two warrantless searches. (Tr.Vol.I, p.139, L.7 – p.141, L.15.) As such, if this Court finds that the first two searches were unauthorized, then the evidence discovered during the third search must be suppressed as the fruit of the poisonous tree.

CONCLUSION

For the reasons set forth herein, Mr. Ligon-Bruno respectfully requests that this Court vacate his conviction because the district court erred when it found that the State had failed to meet its "heavy burden" of proving an exception to the warrant requirement.

DATED this 28th day of November, 2011.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of November, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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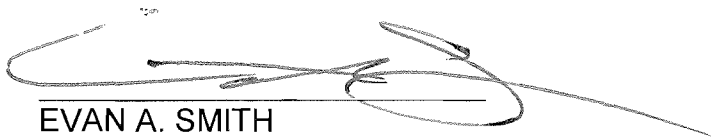

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SJH/eas